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Re: FMC Docket No. 13-05
Comments on Ocean Transportation Intermediary Regulation Revisions
Proposed Amendments to Regulations Governing Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements and General Duties, 78 Fed. Reg. 32946 (May 31, 2013)

The following comments on behalf of Seafreight Line Ltd ("SEAFREIGHT") address the proposed amendments to Sections 515.23(c) and (d), which would create a new payment priority scheme for claims against OTI bonds, with shipper and consignee claims given priority over common carriers, ports, terminals, and other commercial creditors.

SEAFREIGHT strongly opposes the proposed system affording priority status to "shippers and consignees", as such a scheme would unfairly disadvantage carriers and other members of this class of creditors in a manner that is without statutory or factual justification. The proposed amendments to these Sections are discriminatory and unwarranted and SEAFREIGHT accordingly urges the Commission to reconsider the proposed amendments to Sections 515.23(c) and (d).

STATED PURPOSE OF PROPOSED AMENDMENTS TO SECTIONS 515.23(c) and (d)

The purpose for the proposed amendments to Sections 515.23(c) and (d) is reflected in the following remarks contained in the FMC's Advance Notice of Proposed Rulemaking on OTI Regulations (ANPR):

> "The Commission has also observed that carriers may continue to extend credit to NVOCCs until the amounts owed them are excessively high, notwithstanding that they are in a much better position than others to limit their losses to such NVOCCs. It is in this context that the Commission considers it necessary to establish a priority system to provide more protection for shippers."

The unsupported conjecture of the Commission that all carriers, terminals, ports and other commercial creditors are too liberal with there credit practices involving NVOCCs is the sole foundation for the proposed priority system identified in the ANPR. There has been no showing that credit practices complained of are universally practiced by ocean carriers or that regulation of carrier credit practices is a proper use of the Commission's power. The amendment is furthermore overly broad in that it would affect carrier and terminal bond claims unrelated to a carrier's lax credit practices, such as those associated with damaged or lost equipment, misdescription of goods, leased containers, and modest freight claims against the bond.

Concerned that carriers may be recovering a disproportionate share of bond proceeds, the ANPR goes on to cite a single instance in which a claimant (not identified as an ocean carrier) was paid in full because its claim preceded other claims by a number of months, apportioning the balance to the other claimants pro rata. The priority system would do nothing to rectify that scenario. To the contrary, the priority system would impose on carriers the very harm complained of in the cited example. If the goal of the Commission is to preclude the possibility of one creditor recovering in full while others must settle pro rata shares, the proposed three tiered system should be discarded.

While the Commission may be motivated to aid small exporters and importers , as reflected by the Commissions fact finding report addressing deceptive NVOCC practices in the household goods and barrel trade, the proposed amendment does not specifically apply to such a narrow class within the industry, nor can it as it is impossible to describe a typical shipper or consignee or divide them into fixed categories, as they range from small, family owned businesses to multi-billion dollar, publicly traded corporations. Many large shippers are much more substantial financially than regional carriers such as SEAFREIGHT, who would have to unfairly take a back seat to their claims.

The proposed priority system incorrectly assumes that shippers and consignees are a small disadvantaged group that needs special protection; however the reality is that many carriers and terminal operators who would be relegated to secondary status are more greatly affected by uncollected transportation related debts of NVOCCs than large shippers and consignees are.

For example, under the proposed amendment, a large shipper such as Walmart could collect the entire amount of the bond on a claim arising from lost or damaged cargo, while 5 regional ocean carriers with $15K freight claims against the same NVOCC, all of which preceded the Walmart claim, would get nothing. This is the very result the Commission found to be unfair in the example cited in the ANPR.

The risk associated with cargo loss or damage is also adequately covered by marine cargo insurance, which is readily available to cargo interests.

The potential backlash of such a system could adversely affect the very shippers and consignees the amended rule was meant to protect, as carriers and terminals may be inclined to lien cargo more readily than they would if there was a bond in place to secure

non payment of ocean freight. NVOCCs would also suffer as such a change would likely result in greater credit restrictions, hindering their ability to function and grow.

It is important to maintain the very purpose of the bond requirement, to allow recovery for *all* segments of the industry, not just a preferred few. Placing carriers, terminals and ports in line behind shippers and consignees would potentially harm hundreds of entities operating in the transportation industry, and would defeat the very purpose of the existing statutory rule.

JUDICIAL REVIEW OF AGENCY RULEMAKING AUTHORITY

SEAFREIGHT respectfully submits that the proposed priority system, if adopted, would be overturned in federal court as arbitrary, capricious, an abuse of discretion and in excess of the agency's statutory jurisdiction and authority. The ANPR indicates that the Commission is relying on factors which Congress did not intend it consider and has failed to consider important aspects of the harm it would be creating if the Rule is approved.

The plain words of the Shipping Act provide that the only limitation on a surety's liability under an NVOCC bond is that the judgment against an NVOCC arises from an NVOCC's "transportation-related activities." See 46 U.S.C. § 1721(b). The Act in no way suggests that shipper should be granted special status, to the detriment of others in the industry harmed by the NVOCC's inability to pay them.

The Commission has offered no proof of a legislative intention to expand this limitation on a surety's liability. Moreover, it could hardly be said that the broad liability provided in the statute produces an "absurd" result, which is the prerequisite to abandonment of the ordinary meaning of a statute. According to the rules of statutory construction, the statutory command is unambiguous: a bond purchased pursuant to the Shipping Act is available to pay *any* judgment against an NVOCC arising from the NVOCC's transportation-related activities.

The proposed rule which would make a surety's liability contingent upon the claim having been asserted by a shipper or consignee before a claim from a carrier, terminal or port would be ripe is contrary to legislative intent and accordingly violates the separation of powers.

Furthermore, relegating judgments obtained by ocean carriers to second tier status, behind shippers and consignees would not further Congress' goal of promoting "financial responsibility" of NVOCCs but instead such a limitation could encourage financial irresponsibility on the part of NVOCCs, and undermine the potency of § 1721."

LEGISLATIVE PURPOSE WOULD BE UNDERMINED BY THE PROPOSED AMENDMENTS

The purpose of the bond is to pay claims arising from the OTI's transportation related activities. Such activities are identified in 46 CFR 515.2(l), which states as follows:

(l) Non-vessel-operating common carrier services refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

(1) Purchasing transportation services from a VOCC and offering such services for resale to other persons;

(2) Payment of port-to-port or multimodal transportation charges;

(3) Entering into affreightment agreements with underlying shippers;

(4) Issuing bills of lading or equivalent documents;

(5) Arranging for inland transportation and paying for inland freight charges on through transportation movements; motor carriers,

(6) Paying lawful compensation to ocean freight forwarders;

(7) Leasing containers; or

(8) Entering into arrangements with origin or destination agents.

The purchase of services from VOCC's and payment of multimodal transportation charges, which are among the primary obligations of NVOCC's listed in the definition, would now be relegated to second class status.

The 1990 Amendments modified section 23 of the 1984 Shipping Act by requiring NVOCCs to obtain a bond to ensure their financial responsibility for damages, reparations or penalties arising from transportation related activities.

The legislative history of the 1990 amendments indicates that Congress intended that the phrase transportation related activities be interpreted broadly. The committee that issued the House Report addressing the need for a surety bond noted that "the object [of the bill] is . . . to compel NVOCCs to comply with the applicable law to the benefit of *all* who deal with them." H.R. Rep. No. 101-785, at 3 (1990) (emphasis added).

The proposed amendments to Sections 515.23(c) and (d) defeat the legislative intent behind the bill. No longer will *all* segments of the ocean transportation industry be benefitted. Instead, ocean common carriers, terminal operators and ports will effectively

be stripped of the benefit of the bond, being arbitrarily placed behind shippers and consignees, regardless of the financial strength of such entities.

The Commission is effectively attempting to re-write legislation in a manner never intended by Congress. The legislature could have narrowly restricted bond claims but instead described them broadly to protect the entire industry, not just a select few.

In the final rule issued by the FMC on the Bonding of Non-Vessel-Operating Common Carriers to implement the Non-Vessel-Operating Common Carrier Amendments of 1990, 56 FR 51987, the FMC stated as follows:

As Congress has indicated, the bond is intended to ". . . be available to pay *any* judgment for damages arising out of an NVOCC's activities as an ocean common carrier providing ocean transportation services." H.R. Rep. No. 785, 101st Cong., 2d Sess. 3 (1990) (emphasis added).

Congress has never expressed a preference for shippers and consignee claims over carriers, terminals and ports. The executive branch is not divested with the authority to usurp the express intention of the legislative branch to protect all members of the transportation industry who deal with OTI's.

In Bonding of Non-Vessel-Operating Common Carriers, 56 Fed. Reg. 51987 (Oct. 17, 1991), the FMC referenced comments submitted to the FMC during the rulemaking process by various participants in the NVOCC industry suggesting ways the proposed bond form could be narrowed or limited. The FMC rejected these suggestions and concluded: "The language in the bond form limiting the bond to an NVOCC's 'transportation-related activities' tracks the express language of the 1990 Amendments. There does not appear to be any sound basis or reason for otherwise narrowing the scope of the bond." Nor has any sound basis been provided for the proposed narrowing of the scope of the bond to give priority to claims submitted by shippers and consignees over other industry participants, who stand to be left with nothing if shipper claims have exhausted the bond.

In light of this legislative history, SEAFREIGHT submits that that the disenfranchisement of any sector of the ocean transportation industry is not within the FMC's rule making authority. The purpose of the bond is to protect all segments of the ocean transportation industry, and there is no established foundation for the creation of a 3 tiered system which would arbitrarily disenfranchise specified sectors of that industry. The FMC has not provided a reasoned analysis justifying the proposed prioritization of claims. This proposed amendment is inconsistent with the overall statutory scheme established by the bonding requirement and would defeat very purpose of the bond, to be available to satisfy judgments obtained by all segments of the industry.

The disbursement of surety bonds functions best when rules are applied broadly, evenly, and transparently across the spectrum of affected parties. Creating a preferred class of

claimant and delayed payment criteria creates a unnecessary burden on the surety and creates unnecessary delay for the wronged claimant.

CONCLUSION

The proposed amendments are unreasonable and are not necessary to implement the policy and objectives of the Shipping Act As noted by Commissioners Dye and Khouri, who voted against moving forward with the OTI reforms as proposed, the increased compliance costs and absence of a clearly defined harm do not warrant the proposed changes to these sections of the Rules.

SEAFREIGHT thanks the Commission for the opportunity to comment on the aforementioned proposed Rule changes and its reasoned consideration of the points made herein.

Sincerely,

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as counsel for SEAFREIGHT LINE LTD.